
U.S. Department of Labor
OFFICE OF ADMINISTRATIVE LAW JUDGES
Mercedes City Center
200 S. Andrews Avenue, Suite 605
Ft. Lauderdale, FL 33301

Date: November 6, 1990
CASE NO.: 90-ERA-0027

IN THE MATTER OF

THOMAS J. SAPORITO
Complainant,

v.

FLORIDA POWER AND LIGHT COMPANY,
Respondent;

and

CASE NO.: 90-ERA-0047

THOMAS J. SAPORITO,
Complainant,

v.

ATI CAREER TRAINING CENTER, and
FLORIDA POWER & LIGHT COMPANY,
Respondents.

Appearances:

BILLIE PIRNER GARDE, ESQ.
For the Claimant

JAMES S. BRAMNICK, ESQ. and
PAUL C. HEIDMANN, ESQ.
For the Respondents

BEFORE: E. EARL THOMAS
District Chief Judge

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RECOMMENDED DECISION AND ORDER

This proceeding arises under Section 210 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (hereinafter "ERA" or the "Act") and the implementing regulations set forth at 29 C.F.R. Part 24. These provisions, commonly known as the "whistleblower" provisions, protect employees against discrimination in employment for attempting to implement the purposes of the ERA and the Atomic Energy Act, as amended, found at 42 U.S.C. 2011 *et seq*. A hearing was held in Fort Lauderdale, Florida on August 21 and 22, 1990 and all parties were afforded full opportunity to present evidence and legal argument. Briefs were received in this office from Complainant and Respondent, Florida Power and Light Company (hereinafter "FPL"). Respondent, ATI Career Training Center (hereinafter "ATI") did not submit a post-hearing brief but instead relied upon the assertions contained in FPL's document.

STATEMENT OF THE CASE

These cases stem from complaints dated march 14, 1990 (90-ERA-27) and May 11, 1990 (90-ERA-47), as amended, by Mr. Thomas J. Saporito, Jr. against FPL and ATI for harassment and discriminatory conduct in violation of the Act. The initial complaint, brought solely against FPL, alleged that Mr. Saporito was the subject of an ongoing practice and pattern of intimidation and harassment through "blacklisting" designed to discourage him and others from participating in protected activities. Specifically, Complainant alleged that he was placed in an "embarrassing and intimidating position before his employer (ATI)" when an attorney for FPL forwarded an employment verification letter to the school. The purpose of this letter was to determine whether Mr. Saporito worked in Miami. The correspondence was sent in connection with a proceeding before the United States Nuclear Regulatory Commission, Atomic Safety and Licensing Board (hereinafter "NRC" and "ASLB", respectively) regarding licensing of FPL's Turkey Point plant in which Complainant sought to intervene. Further, the complaint alleged that a comment which an FPL spokesperson had made to a local newspaper reporter was discriminatory and jeopardized Mr. Saporito's procurement of future employment.

Complainant amended his initial complaint, by letter to the United States Department of Labor (hereinafter "DOL"), on March 27, 1990. Therein, he stated that he had received a second letter from FPL's attorney, which had been copied to ATI, outlining the reasons for the original inquiry. Mr. Saporito

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believed that this letter was an additional instance of intimidation.

Mr. Saporito further supplemented his March 14th complaint to the DOL on March 30, 1990. In this correspondence, Complainant alleged that he had been bypassed for an afternoon teaching position at ATI as a direct result of FPL's actions; thus, he maintained FPL was continuing an existing pattern of harassment.

After an initial investigation by the DOL Wage and Hour Division, the agency concluded, on April 2, 1990, that no violation of the ERA had occurred. Accordingly, Mr. Saporito's original petition was denied. Complainant timely appealed that determination and requested a *de novo* public hearing.

Complainant's second complaint, dated May 11, 1990, was filed against both FPL and ATI. In that complaint, Mr. Saporito alleged that he was terminated by ATI in May, 1990 due to the previously referenced correspondence issued by FPL in March. It is to be noted that Complainant was proceeding *pro se* until this point.

On June 4, 1990, the DOL issued its decision with respect to Complainant's second cause of action. Again, the Wage and Hour Division determined that, no violation of the Act had been substantiated. Mr. Saporito timely appealed that determination as well.

Complainant's two complaints were consolidated for hearing by Order of Consolidation dated June 11, 1990. Thereafter, the matter was referred to the office of Administrative Law Judges for adjudication. The exhibits proffered at the hearing, along with the hearing transcript, comprise the record herein.[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND

Mr. Saporito was employed by FPL, a private utility company, from March, 1982 until his discharge on December 22, 1988. While Complainant challenged the validity of this

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termination under the Act, Administrative Law Judge Anthony J. Iacobo determined in his Recommended Decision and Order of June 30, 1989 that Mr. Saporito was properly discharged for insubordination. The reasons found to uphold the termination were three-fold; namely, Complainant's refusal to divulge safety concerns to FPL management; Complainant's refusal to holdover to attend a meeting scheduled by his supervisors; and Complainant's refusal to submit to a physical examination by a licensed physician chosen

by FPL. This decision was appealed by Mr. Saporito and is currently pending before the Secretary of Labor.

Prior to his discharge, Complainant worked at FPL's Turkey Point Nuclear Power Plant (hereinafter "Turkey Point") near Homestead, Florida. He resides in Jupiter, Florida which Judge Iacobo judicially noticed as a distance in excess of 100 miles from the facility. Complainant obviously had great concern regarding safety conditions at Turkey Point as he initiated contact with the NRC regarding alleged safety violations at the plant in 1988. Moreover, Mr. Saporito has continuously maintained this contact, ostensibly to provide a conduit between FPL nuclear power employees and the NRC.

On December 5, 1988, Complainant sent information to the NRC detailing eighty-two alleged safety violations at Turkey Point. As a result of the allegations, the NRC deployed an investigative team to the plant to determine the validity of Mr. Saporito's concerns. Of the eighty-two allegations raised, the NRC team determined that thirty-nine were unsubstantiated, thirty-one were at least partially substantiated but had "little or no safety significance," and the remaining twelve had been previously identified by FPL and the proper corrective actions had already been taken. This investigation received a great deal of publicity within the community through the local media.

On December 14, 1989, Complainant secured a part-time teaching position at ATI in Miami, Florida. ATI is a technical school, offering courses in electronics, air conditioning/refrigeration, computer-assisted design and other related subjects. ATI is headquartered in Dallas, Texas and is accredited by the National Association of Trade and Technical Schools (hereinafter "NATTS"). The Miami school operates on a system of ten-week quarters and employs approximately twenty to thirty instructors to teach a three hundred forty member student

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body.

Complainant was so employed, teaching an evening class in digital electronics, from the date of his hiring until he was discharged on May 10, 1990. Mr. Saporito was hired by Randall Withers, Director of Education at ATI until mid-April, 1990. Dr. Peter Diaz subsequently replaced Mr. Withers. Both Mr. Withers and Dr. Diaz reported to Mark Gutmann, the Director of the school. As Director, Mr. Gutmann oversees all operations at the school but does not become involved in the day-to-day management of the various departments unless a problem arises. According to both Mr. Gutmann and Dr. Diaz, who had control over hiring and termination within his area, Complainant was discharged due to his poor attitude and because he was not a "team player." Mr. Saporito, on the other hand, contends he was discharged solely on the basis of his participation in protected activities under the Act.

A. <u>The Golden Comment</u>

In October, 1989, Complainant formed an environmental organization known as the Nuclear Energy Accountability Project (hereinafter "NEAP"). Complainant is the President, Treasurer and Executive Director of NEAP as well as Editor of the group's newsletter. The purpose of this organization is to "ensure that the nuclear power plants in Florida operate safely and in full compliance with federal regulations."

On February 14, 1990, Complainant, in his capacity as Executive Director of NEAP, requested the NRC investigate an allegation that a quality control inspector, Steven E. Kennedy, was resigning from FPL because he was "being forced to sign-off safety related documents for parts and equipment which he had not inspected." In addition to forwarding the allegations to the NRC, Complainant released the allegations to "all media sources." According to Mr. Saporito, he took that action because it is "his policy (and the policy of NEAP) to hold ... government representatives as well as the utilities accountable to the public for actions that have an impact on public health and safety." By coping the allegations to the media, he would be ensured the NRC adequately investigated his concerns.

The following day, February 15, 1990, The Miami Herald published a story based on Mr. Saporito's letter. The article

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stated that the NRC was investigating allegations that Steven Kennedy, an FPL inspector, had "resigned because he was ordered to falsify safety inspection reports."

On February 16, 1990, Mr. Kennedy wrote a letter to the NRC refuting the allegations Complainant had raised in his February 14, 1990 letter.[2] Kennedy stated, *inter alia*,:

> Acording to recent news items, a self proclaimed nuclear "watch-dog" group issued a letter to the Nuclear Regulatory Commission that was very misleading and in many respects totally false. In the past, I have doubted the credibility of this group and their actions in this case reinforces this belief. I was not contacted by them and I consider the letter which they sent to the NRC to be documented evidence of their irresponsibility. They have done a disservice to myself, Florida Power and Light Co., and the public in general.

This statement, like many others in this case, was distributed to the local media, particularly newspapers in Palm Beach, Broward and Dade Counties. Charles Elmore, a reporter with the Palm Beach Post, contacted both Complainant and FPL for comment on Mr. Kennedy's letter. Mr. Saporito stated that "there's a cloud hanging over this whole investigation." Ray Golden, FPL's Communication's Coordinator, said "finally this may be one more nail in Saporito's coffin." Mr. Golden testified that he believed his comment to be an off-the-record response to a request for his personal opinion. Both statements were published in the February 17, 1990 edition of the Palm Beach Post.

After publication of Mr. Golden's remark, Complainant states that he felt "humiliated and embarrassed" because the paper is widely distributed in the area in which he, his family and other FPL employees reside. Further, he believed that Mr. Golden's comment "discredited him and undermined the work he was doing to protect public health and safety." To support this contention, Claimant asserts that since the "nail in the coffin" statement was published, workers at FPL nuclear facilities have been much more reluctant to make their safety concerns known to him, resulting in this "channel of information to the NRC drying up."

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FPL maintains that Mr. Golden's statement addressed Complainant's credibility with the NRC solely. Mr. Golden "meant that by Complainant's own actions, Complainant's credibility with the NRC may be waning." Indeed, Respondent cites Judge Iacobo's determination that Complainant had been discharged for insubordination and the fact that the NRC's investigative team failed to substantiate a number of Complainant's safety allegations at Turkey Point as the other "nails" addressing Mr. Saporito's credibility.

B. <u>The Butler Letters</u>

Subsequent to Mr. Saporito's dismissal from FPL but prior to the Golden comment, Complainant had sought to intervene, on his own behalf as well as NEAP'S, in an ASLB proceeding regarding amendments to the technical specifications for two nuclear generating units at Turkey Point. He filed a petition to intervene on December 27, 1989. In January, 1990, both FPL and the NRC filed motions opposing Complainant's petition on the ground that Complainant lacked the requisite standing to intervene as he neither lived nor worked within the NRC's fifty-mile "zone of interest." Briefly, the NRC's rule states that an intervenor must either work or reside within fifty miles of the nuclear power plant to meet the standing requirement. On March 5, 1990, Complainant filed an amended petition to intervene in the ASLB proceeding. He attached an affidavit stating the location of his job at ATI and his hours of employ with the school to establish his compliance with the fifty-mile rule.

John T. Bulter, a partner in the law firm of Steel, Hector & Davis in Miami, and Harold Reis, a partner in the law firm of Newman & Holtzinger, P.C., in Washington, D.C., were co-counsel for FPL in the ASLB proceeding. on or about March 6, 1990, they decided to verify the information in Complainant's affidavit as the question of Mr. Saporito's standing was of great import to the ASLB proceeding.

Mr. Butler and Mr. Reis discussed various methods, ranging from a telephone call to a deposition, to verify these facts. They settled on mailing a letter to ATI as it would provide them with written documentation of the contact. Further, they decided to send Complainant a copy of the letter. The correspondence, signed by Mr. Butler, requested ATI verify the employment-related statements which Complainant had proffered in his affidavit.

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On March 8, 1990, Mr. Gutmann received Mr. Butler's letter. Mr. Gutmann testified that he did not "pay much attention" to the letter as he routinely receives salary and employment verification requests. Consistent with his policy, Mr. Gutmann informed Mr. Saporito of the inquiry and told him that he was going to confirm that Complainant was employed at ATI. Complainant told Mr. Gutmann that it was "okay" to respond. Mr. Gutmann stated that he did not believe that Complainant was embarrassed or concerned about the letter at the time. He also did not find the correspondence to be intimidating, hostile, coercive or unprofessional. Moreover, Mr. Gutmann did not believe the letter to be of particular significance to warrant discussion with anyone else at the school. Mr. Gutmann telephoned Mr. Butler on March 9, 1990 and confirmed Complainant's employment with ATI. Upon confirmation, FPL withdrew its challenge to Complainant's standing.

On the same day as the Gutmann-Butler telephone conversation, Complainant wrote the NRC alleging that the March 7, 1990 letter from Mr. Butler placed him in an "embarrassing and intimidating position before his employer." He further claimed that it was "totally out of line and unethical and unprofessional and represents an unwarranted attack of Mr. Saporito's integrity and privacy." Complainant provided Mr. Butler with a copy of his correspondence. Mr. Butler testified that he was "surprised" by Complainant's response as he felt the letter to ATI was innocuous. On March 19, 1990, Mr. Butler and Mr. Reis drafted a letter to Complainant which they copied to ATI. Therein, Mr. Butler stated that he regretted that Complainant found his initial correspondence threatening or coercive and that its sole purpose was to verify the facts relating to the standing issue.

Subsequently, the ASLB addressed Complainant's assertion that he felt intimidated by Mr. Butler's letters. In a Memorandum and Order dated April 24, 1990, the ASLB stated the following: "[MR. Saporito] has not persuaded the Board that there is any valid reason for his serious charge of intimidation." With respect to Mr. Butler's first letter, the ASLB stated, *inter alia*:

> We have examined that letter [to ATI] and have concluded that it was a simple factual inquiry for the purpose of confirming facts concerning Mr. Saporito's

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> employment. There is nothing in the letter that we consider to be intimidating. Indeed, all the letter may have done with respect to Mr. Saporito's employment relationship is to bring to the employer's attention, in a neutral manner, a fact that is common knowledge and that Mr. Saporito reasonably must have expected his employer to learn during the course of this litigation: that Mr. Saporito is involved in a case affecting Florida Power and Light...

Complainant then amended his complaint, on March 27, 1990, to include the allegation that FPL continued to harass, intimidate and embarrass him before his employer by

copying the letter of apology to ATI. The ASLB also commented on Mr. Butler's second letter. The ASLB stated that while there did not appear to be "any strong reason" for Butler to send a copy of that letter to ATI, Butler may have felt "that the letter would reassure the employer about there being no coercive intent [behind the first letter] and we find that the routine copying of that letter does not, by itself, demonstrate coercion to this Board."

C. Complainant's Employment Relationship with ATI

As previously noted, Mr. Saporito was employed as a part-time instructor on December 14, 1989. He was hired by Mr. Withers, who was then the school's Director of Education, and worked approximately twenty hours a week. Mr. Saporito taught a class in digital electronics from 6:00 p.m. until 11:00 p.m., Monday through Thursday. Mr. Withers, and subsequently Dr. Diaz, was his immediate supervisor.

Beginning in January, 1990, problems arose between Complainant and the school's administration. Mr. Saporito testified that he had difficulty obtaining teaching supplies from Mr. Withers. Notably, he stated that this was a problem prior to the Butler letters as well as afterward. He also had trouble obtaining supplies from Dr. Diaz.

In late March, 1990, two instructors left ATI during the quarter. One of those instructors, Calvin Gatewood, taught an afternoon class in semi-conductor electronics. There was also a paid assistant instructor assigned to that class, Jorge Jorge. Mr. Gatewood had not informed Mr. Withers that he was leaving

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ATI's employ. Indeed, there was a four-day period during which Mr. Withers thought Mr. Gatewood was absent due to illness. During that period of time, Mr. Withers had Mr. Jorge teach the class. Mr. Withers sat in on the class and observed that Mr. Jorge was doing a fine job. Moreover, the class had accepted him. Mr. Withers then learned that Mr. Gatewood was leaving.

Complainant spoke to Mr. Withers about filling the vacancy created by Mr. Gatewood's departure. Complainant wanted the position so that he could teach full-time. Mr. Withers decided not to assign Complainant to the class because he felt that Mr. Gatewood's departure was disruptive and did not wish to disturb the class further by introducing a new instructor. Therefore, he decided to replace Mr. Gatewood with Mr. Jorge. At the hearing, Complainant stated that he was bypassed for the position vacated by Mr. Gatewood as a result of the Butler letters.

At the end of the month, Mr. Gutmann received another written request to verify that Complainant worked at ATI. The request was from a mortgage company. In response to one question on the form, Mr. Gutmann wrote that the probability of Complainant's

continued employment at ATI was "excellent." Mr. Gutmann completed the form on March 29, 1990, after he had received the Butler letters.

In addition to Mr. Gatewood leaving ATI in the midst of the spring quarter, Mr. Withers also departed. Mr. Withers left on Friday, April 20, 1990 and his replacement, Dr. Diaz, began working for ATI on Tuesday, April 17, 1990. During Mr. Withers' last days at ATI, he tried to organize a tentative schedule for the instructional staff for the next quarter. He needed someone who could teach microprocessors. Mr. Withers had a brief conversation with Complainant in which he asked him whether he was able to teach that material and whether he was available to teach in the afternoon during the upcoming quarter. Complainant responded that he was able and available. Mr. Withers advised Mr. Gutmann that Complainant was available to teach microprocessors in the afternoon for the next quarter. Mr. Gutmann subsequently offered Complainant the position; however, he intended to reserve final approval on the totality of the tentative schedule to Dr. Diaz.

Shortly after Dr. Diaz's arrival, Mr. Gutmann held a staff

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meeting to introduce Dr. Diaz to the faculty of the school. At the meeting, Dr. Diaz testified that Complainant displayed a negative attitude towards him. Mr. Saporito denies this assertion. Dr. Diaz also stated that the remainder of the staff was upbeat and positive about his appointment.

Prior to the meeting, Mr. Gutmann discovered a letter written by Complainant on his desk. The letter addressed various complaints that Mr. Saporito had with the school. Namely, Complainant found ATI's curriculum to be inconsistent, student supplies deficient, lab equipment outdated and poorly maintained, instructional materials scarce and classroom boards dirty. Mr. Saporito sent a copy of this letter to ATI headquarters in Dallas and to the Executive Director of NATTS. Mr. Gutmann met with Complainant and asked him to draft a letter to NATTS informing them that ATI was resolving his concerns. Complainant so wrote the accrediting agency and copied the correspondence to Mr. Gutmann and the ATI headquarters. Apparently, both parties believed they could "work out their differences."

On April 23, 1990, Mr. Gutmann held a meeting with Dr. Diaz and Complainant to discuss Complainant's letter. At that meeting, Mr. Gutmann confirmed his offer to Complainant to teach both afternoon and evening classes, thus a full-time position, during the school's next quarter. At this point, Dr. Diaz made no objection to Complainant's appointment. Additionally, Dr. Diaz testified that as of the April 23rd meeting, he was unaware of Complainant's involvement in proceedings with FPL.

Dr. Diaz conducted his first staff meeting at the end of that week or early the following week. He testified that Complainant's attitude at the meeting was poor. Dr. Diaz reached the decision that Mr. Saporito had to be replaced. Sometime after April 23, 1990 and

before May 7, 1990, the date on which Mr. Gutmann received a deposition subpoena in connection with this proceeding, Dr. Diaz approached Mr. Gutmann and told him that he was going to discharge Complainant. Dr. Diaz told Mr. Gutmann that he was very unhappy with Complainant and that he did not want Complainant on his staff. Mr. Gutmann reiterated that it was Dr. Diaz's decision as long as he had a replacement for Complainant. Both administrators decided to allow Complainant to finish the quarter before discharging him. Accordingly, Dr. Diaz waited until May 10, 1990 to terminate Complainant. Concomitant with the discharge, Dr. Diaz offered to

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write letters of recommendation for Complainant.

A factual dispute exists as to the language utilized by Dr. Diaz during the discharge meeting. Complainant testified that at the meeting, Dr. Diaz told him that he had been "directed to terminate Complainant by Mr. Gutmann because Mr. Gutmann did not want ATI involved with litigation involving FPL and DOL." Dr. Diaz denied making any such statement. Dr. Diaz testified that he told Complainant that he would not be needing him the next quarter because Complainant was not a "team player" and he did not want him as part of his staff.

Approximately one week after the discharge meeting, Complainant sent a letter to Dr. Diaz requesting that he write letters of recommendation for two prospective employers. Dr. Diaz sent the requested letters and mailed copies of them to Complainant. The body of those letters was identical. The letters stated, *inter alia*, that Complainant "always came to class prepared and his paperwork was impeccable. Mr. Saporito possesses outstanding organizational skills and is in my experience dependable and punctual." No other contact was made between the parties until discovery procedures were initiated in context of this proceeding.

II. STATEMENT OF THE LAW

A. Issues

The issues presented herein are basically two: (1) Was the comment by an FPL's spokesperson inherently discriminatory conduct subjecting FPL to the Act's mandates; and (2) Did the Butler letters amount to blacklisting in violation of the ERA and cause Complainant's termination from ATI.

B. Establishing a Prima Facie Case

To sustain a discrimination claim under the Whistleblower Protection Provision of the Energy Reorganization Act, the Complainant must prove, by a preponderance of the evidence, that:

(1) the party charged with discrimination is an employer subject to the Act;

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(2) the complainant was an employee under the Act;

(3) the complaining employee was discharged or otherwise discriminated against with respect to his or her compensation, terms, conditions, or privileges of employment;

(4) the employee engaged in protected activity;

(5) the employer knew or had knowledge that the employee engaged in protected activity; and

(6) the retaliation against the employee was motivated, at least in part, by the employee's engaging in protected activity.[3]

Once the complainant, establishes a *prima facie* case, the burden of proof shifts to the respondent to prove affirmatively that the same decision would have been made even if the employee had not engaged in protected activity.[4]

III. JURISDICTION

This case was brought under the Employee Protection Provision of 42 U.S.C. § 5851. The statute provides:

> No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 *et seq*.), or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> (2) testified or is about to testify in any such proceeding or;

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> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 *et seq*.].

For this tribunal to exercise jurisdiction over a claim, it must first be determined that the participants in the cause of action fall within the scope of the Act's provisions. In the instant case, the Court must determine whether ATI and FPL are "employers" subject to the Act and whether Mr. Saporito is an "employee" entitled to the ERA's protections.

A. ATI as Employer

An employer is defined as "a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant ... The undersigned first turns to ATI. Complainant maintains that ATI falls within the ERA's definition of an employer because the Congressional intent behind the Act was for it to be "liberally construed" to effectuate its remedial purpose. Complainant cites a National Labor Relations Act (hereinafter "NLRA") case where a bank was held to be an employer because its conduct tended to discourage unionization, even though the action was not directed at the bank's employees. *See, Seattle-First National Bank v. NLRB*, 651 F.2d 1272 (9th Cir. 1980). While the Court agrees that the Act should be construed broadly and that NLRA case law is to be referenced for guidance in this area, these concepts cannot be employed to extend coverage beyond the plain meaning of the ERA.

ATI neither operates a nuclear power plant on its own behalf or under contract from any other entity nor is it an applicant for any such license. Further, ATI maintains no special relationship with FPL. While a limited number of ATI graduates may eventually be employed at FPL, there exists no recruitment program between the two organizations. It appears to this Office that the sole contact between the corporate entities, prior to this proceeding, was the sale and purchase of electricity.

The language of the Act appears definite on its face.

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ATI's activities do not place the school within the realm of the definitional terms set forth in 42 U.S.C. § 5851. Moreover, the legislative history relating to the employee protection provision of the ERA indicates that the word "employer" refers to entities related to nuclear power plants either by contract or license from the NRC. Notably, the Congressional records addressing this legislation describe the whistleblower provision as "provid[ing] protection to employees of Commission licensees, applicants, contractors, or subcontractors ... " *See*, H.R. Conf. Rep. No. 95- 1796, 95th Cong., 2nd Sess. 16 (1978), *reprinted in* [19781 U.S. Code Cong. & Admin. News 7303. Accordingly, ATI is not an employer within the meaning of the Act; therefore, this Court lacks jurisdiction to decide Complainant's claim against ATI.

B. FPL as Employer

The Court next addresses FPL's availability for suit under the ERA. It is beyond doubt that FPL fits squarely within the Act's definition of a covered employer. What remains

questionable, however, is whether FPL, through its actions, subjected itself to the ERA's provisions after Mr. Saporito left its employ.

Case law has established that an employer is capable of discrimination, thus subject to the Act, even though the individual discriminated against is not its employee. *Young v. Philadelphia Electric Co.*, 87 ERA 11, 88 ERA 1 (February 4, 1988). Indeed, in *Hill v. Tennessee Valley Authority*, 87 ERA 23 (May 24, 1989), the Secretary of Labor held that the language of the Act "is not limited in terms to discharges or discrimination against any specific employer's employees, nor to "his" or "its" employees." However, the Secretary also noted that "this ruling is limited to the narrow facts and circumstances here presented. There is no occasion here to decide whether other employees, differently situated, could seek the Act's protection from alleged discrimination." Nonetheless, a former employer was found liable, under a continuing violation theory, for discriminating against a former employee. *Egenrieder v. Metropolitan Edison Co*., 85 ERA 23 (April 20, 1987). The Egenrieder case held, however, that the basis for this ruling was. the determination that the former employee had been "blacklisted" from employment with other nuclear facilities by the respondent. In the instant case, for FPL to be subject to the Act's provisions, it must be found to have discriminated against

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Complainant through continuing discriminatory acts, specifically, through the alleged means of blacklisting.

C. Complainant as Employee

The determination of whether Mr. Saporito is a covered employee under the Act goes hand-in-hand with a decision regarding FPL's status under the ERA. Complainant may only be deemed an employee of FPL if it is established that FPL engaged in discriminatory conduct against him. See, Hill, supra. Thus, to determine whether this Court may rule in this instance, it must first be established that FPL engaged in ongoing discriminatory conduct against Mr. Saporito in violation of the Act.

IV. THE QUESTION OF DISCRIMINATION

A. The Two Events Giving Rise to the Claim

The case at bar is not a typical whistleblower claim where an employee of an NRC licensee "blew the whistle" on his employer and the employer subsequently discharged the employee. While FPL is a licensee of the NRC, the events given rise to this cause of action occurred after Complainant and FPL had terminated their professional relationship.

Complainant maintains that he has been discriminated against by Respondents through their conduct toward Complainant as evidenced by two specific acts. Initially, Mr.

Saporito contends that the comment by FPL's spokesperson, Ray Golden, in the Palm Beach Post is inherently discriminatory conduct in violation of the Act. Secondly, Complainant states that the employment verification letters sent by FPL's counsel to ATI, in connection with the ASLB proceeding, "interfered with the terms and conditions of his employment" with ATI. Thus, as a former employer, FPL blacklisted Complainant causing his eventual discharge from ATI. Complainant believes these actions were taken as a result of his participation in protected activities. Specifically, Mr. Saporito alleges that his actions of reporting his safety concerns about FPL's Turkey Point plant to the NRC and his petition to intervene in an FPL licensing proceeding form the foundation for those alleged discriminatory practices. This Office must review each of these incidents separately to decide whether Complainant has established a *prima facie* case under the ERA.

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B. The Golden Comment

One of the focal issues in dispute herein is whether the "nail in the coffin" statement by Ray Golden, as published in the Palm Beach Post, constituted an act of inherently discriminatory conduct. Conduct is regarded as inherently discriminatory if the natural consequence of the action is to encourage or discourage certain conduct on the part of an employee. *NLRB v. Erie Register Corp*., 373 U.S. 221 (1963). If actions are so deemed, the employer is held to have intended the foreseeable consequences of its actions and specific proof of discriminatory intent is not required.

In the instant case, the comment, attributable to FPL by the nature of Mr. Golden's employment as Communications Coordinator, arose from a series of events culminating in Steven Kennedy's resignation from FPL. As previously noted, Complainant forwarded correspondence to the NRC stating that Mr. Kennedy resigned because he was being forced to "sign off" on parts and equipment he had not inspected. Mr. Saporito additionally copied this letter to the local media. Subsequently, Mr. Kennedy publicly refuted Complainant's assertions regarding his resignation. Charles Elmore, a reporter with the Palm Beach Post, contacted Mr. Golden and Complainant about the matter. Both parties resorted to cliche's to express their opinions. Mr. Saporito stated there was a "cloud hanging over the whole investigation;" Mr. Golden said that Mr. Kennedy's refutation of Complainant's allegation "finally... may be one more nail in his coffin."

Complainant asserts that the nature of the comment reveals animus toward Complainant and his activities. It sends a message that those who utilize Complainant as a conduit of information to the NRC are subject to similar treatment. Further, Complainant maintains that this animus is directed to the activities of Complainant protected by the Act. As proof of these allegations, Mr. Saporito states that the Golden Comment has had a chilling effect on FPL employees as employee contact with Complainant has decreased significantly since the statement's publication. Since this communication has produced a chilling effect, according to Complainant, it is inherently discriminatory. Therefore, Mr.

Saporito is under no legal obligation to establish a discriminatory intent on the part of FPL.

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The Court cannot agree with this assertion. The "nail in the coffin" comment speaks to Complainant's credibility, not to his engagement in protected activity. Given the nature of the contact between Complainant and FPL to that point, it appears reasonable that FPL would have cause to question Mr. Saporito's believeability. This lack of credibility, and possible decrease in FPL employee contact with Complainant, cannot rest with FPL. Mr. Saporito's own conduct, as evidenced by his discharge from FPL for insubordination and Mr. Kennedy's refutation, can only be blamed for any loss of contact with employees at FPL. Notably, Complainant proffered no proof of this alleged chilling effect. He failed to call a single FPL employee to testify at the hearing, nor were any affidavits or depositions of FPL employees contained in the record corroborating Mr. Saporito's claim.

Additionally, this comment does not reveal particular animus towards Complainant. Rather, it appears to be a somewhat innocuous statement addressing Mr. Saporito's credibility. Complainant's credibility is certainly germane to FPL as he is an intervener in their ASLB proceeding. While Mr. Golden could have refrained from an "off-the-cuff" comment, his statement speaks only to FPL's perception of Complainant's credibility.

Complainant notes that his allegations were raised in good faith, although the majority of his concerns were unsubstantiated. He further maintains that FPL "has no qualms about publicly humiliating employees who raise safety concerns" and that FPL, through the Golden Comment, sent a message to employees that "they better be right if they are going to the NRC." The evidence belies such a finding. While it is true that an employee is not required to show that he disclosed unique evidence to the NRC, or evidence that an employer attempted to hide in order to establish a case under the ERA, the alleged retribution for this action must be supported by the record. *DeFord, supra* at 286. That showing has not been made here. Respondents have not questioned, and there appears no reason to question, Complainant's good faith in raising safety allegations. However, a zealous belief in unsubstantiated concerns cannot be formed into a viable complaint by reading more into a comment than exists. Accordingly, the Court finds that the Golden Comment was neither inherently discriminatory nor a violation of the ERA.

Respondents maintain that if the Golden comment is viewed

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as substantial, it is protected by FPL's First Amendment right to free speech. Both parties to this cause of action are free to exercise their rights of free speech; moreover, were this proceeding grounded in defamation, Mr. Saporito's status as a public figure would require clarification. However, as the Court has ruled that the Golden Comment is not a violation

of 42 U.S.C. § 5851, the statute in question, a discussion of any First Amendment ramifications of the Golden Comment is unwarranted and beyond the scope of this tribunal.

C. The Butler Letters

1. Discriminatory Intent

The second significant area of dispute revolves around the letters sent to ATI by John Butler, counsel for FPL in the ASLB proceeding, regarding verification of Complainant's employment at ATI. Complainant maintains FPL's motivation for these letters was an intent to "intimidate, threaten, restrain, coerce, blacklist, discharge or ... discriminate" against Complainant for his involvement in protected activities. Moreover, Mr. Saporito asserts his termination by ATI was caused by, and in the spirit of, this discriminatory intent.

Discriminatory intent or retaliatory motive is a legal conclusion provable by circumstantial evidence although there exists testimony to the contrary by a witness who perceived a lack of improper motive. *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563 (8th Cir. 1980), *cert. den'd*., 405 U.S. 1040 (1981). Several methods, such as anger toward Complainant's protected conduct and a suspicious sequence of events surrounding the employees conduct, may serve to establish the requisite discriminatory motive in whistleblower claims.[5] Complainant notes the Golden Comment as the instance of FPL's animosity toward Complainant's protected activity and the events surrounding the Butler letters, as well as the letters themselves, as suspicious. Since the undersigned has previously addressed the Golden Comment, there exists no cause to reiterate the Court's finding except to note that the "nail in the coffin" statement does not reflect animosity toward Mr. Saporito's participation in protected activities.

Addressing the Butler letters, the undersigned finds that

FPL had a legitimate interest in verifying Complainant's employment with ATI. Mr. Saporito sought to intervene in an ASLB proceeding regarding FPL's Turkey Point facility. The question of his standing was pivotal to his availability to intervene. He sought to establish that standing through his employment at ATI. In addition, the method FPL chose to corroborate Mr. Saporito's affidavit was reasonable under the circumstances. The letters in question were merely a verification of information request and a letter of apology. While the same employment information could have been garnered vocally, it is not unreasonable for FPL to prefer to have written documentation. The language of both the initial inquiry and the subsequent apology were not coercive, intimidating or threatening. Indeed, the correspondence appears direct and professional.

Complainant contends that the letters were "carefully written and edited to affect Complainant's standing in the licensing proceedings by effecting his employment at ATI." Mr. Saporito cites that since two partners at two law firms drafted the employment verification letter, there must exist some "end" they sought to achieve. Particularly, he proffers that this letter intended to "plant a seed of doubt" by informing ATI that one of their employees was involved in a major legal proceeding with FPL over its nuclear plant. Further, Complainant maintains the second letter was copied to ATI to "nourish the seed" by reminding the school of Complainant's involvement with FPL and to inform them that they too were involved.

Again, the Court is unpersuaded by this argument. The sequence of events surrounding the Butler letters suggests no discriminatory intent or retaliatory motive. Indeed, the evidence as a whole does not support such a conclusion. It does not appear unreasonable that in an ASLB proceeding, a matter of considerable import to FPL, that two attorneys would be utilized in that particular proceeding. Further, as Complainant's assertion that he worked within the fifty-mile "zone of interest" was focal to his availability to intervene in the hearing, the verification letter was important to the proceeding as a whole. Collaboration between two attorneys employed by the same client does not automatically give rise to a discriminatory intent. Complainant offered no objective evidence, circumstantial or otherwise, to establish that FPL discriminated against him through the Butler letters as retaliation for his participation in the ASLB proceeding.

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2. Blacklisting

Concomitant with this assertion is Complainant's allegation that FPL blacklisted him through the Butler letters. Blacklisting is defined as:

> A list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate; as where a trades-union "blacklists" workmen who refuse to conform to its rules, or where a list of insolvent or untrustworthy persons is published by a commercial agency or mercantile association.

Black's Law Dictionary (5th Ed. 1983).

Since blacklisting, by its very nature, is a continuing course of conduct, it may constitute a continuing violation if it is based upon an employees protected activity under the ERA. *Egenrieder, supra*, at 29. In the case at bar, the Butler letters do not fall within this definition. The initial letter, as previously noted, was solely an employment verification request. Upon confirmation of Complainant's employment at ATI, FPL withdrew its objection to his standing in the ASLB proceeding.

Mr. Butler's second letter, which was copied to ATI, does not constitute blacklisting either. The evidence of record suggests that the parties involved took little note of the apology. Significantly, the ASLB did not consider the letters to constitute blacklists. To establish a *prima facie* case under the ERA, Complainant must prove that FPL took adverse action against him because of his protected activities. The Butler letters, either under a theory of discriminatory intent or blacklisting, cannot sustain such a finding.

3. Attorney-Client Privilege and Work Product

With reference to Respondent's assertion that the Butler letters constituted work product and fell within the attorney- client privilege, the undersigned has previously addressed that issue. By Order dated August 9, 1990, this office ruled that since the nature of Complainant's allegations were directly correlated to the Butler letters, the attorney-client privilege

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was unavailable. Further, the work-product doctrine was only held applicable to Mr. Butler's mental impressions and litigation strategy. The letters themselves were not so covered. The Court finds no reason to deviate from this position at this juncture.

4. ATI's Termination of Complainant

Assuming, arguendo, that ATI is an employer within the meaning of the ERA, its actions in terminating Complainant must be scrutinized under the Act's mandates. The facts establish that Complainant was hired as a part-time teacher by ATI on December 14, 1989 and discharged on May 10, 1990. During his employment at ATI, several noteworthy events occurred between Mr. Saporito and the school's administration. Namely, on April 19, 1990, Complainant wrote a letter to Mark Gutmann, which he copied to ATI headquarters and NATTS, outlining areas of concern he had about the school. On April 21, 1990, Complainant authored a letter to NATTS, at Mr. Gutmann's behest, assuring the agency that his concerns were being addressed by ATI. Two days later, Complainant met with Mr. Gutmann and Dr. Peter Diaz, the recently hired Director of Education, to discuss the letter. At that time, Mr. Gutmann extended an offer to Complainant to become a full-time instructor. Notably, this offer was extended well after Mr. Gutmann had received and reviewed the Butler letters. After meeting with Mr. Saporito, Dr. Diaz, who controlled employment decisions within his department, decided to terminate Complainant. During the termination, on May 10, 1990, Dr. Diaz offered to write Complainant letters of recommendation for potential future employers.

Complainant maintains that his termination by ATI was motivated by the Butler letters. He alleged that after receipt of that correspondence, he was "treated differently" by ATI, denied teaching supplies, denied a position that became open during his tenure and eventually discharged. In support of this allegation, Complainant offered the testimony of A. Saumell, a former ATI student. Mr. Saumell testified that Complainant's appearance

on television was known by the student body and his involvement in legal proceedings with FPL was discussed among ATI students. He further stated that he overhead a discussion between Dr. Diaz and Mr. Withers, the prior Director of Education, regarding FPL correspondence.

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Mr. Saumell's testimony does not establish that ATI violated the Act. Initially, Mr. Saumell's testimony regarding the alleged conversation between Dr. Diaz and Mr. Withers is hearsay. Moreover, it was not offered for the truth of the matter asserted. As this Office is under federal jurisdiction, it is bound by those evidentiary rules. This testimony, therefore, is accorded little probative weight. Had Mr. Saumell heard Mr. Withers mention FPL letters, his testimony did not establish that Mr. Withers was referring to the Butler letters. To the contrary, Mr. Saumell testified that he did not hear either Mr. Withers or Dr. Diaz refer to Complainant. Both Mr. Withers and Dr. Diaz testified that they never discussed Mr. Saporito. Additionally, Mr. Gutmann testified that neither Mr. Withers nor Dr. Diaz was aware of the Butler letters.

The timing of Mr. Saporito's termination from ATI offers no support to his claim. Case law has held that when an employee is terminated shortly after participating in protected activity, a presumption arises that the termination was the result of the employees conduct in engaging in protected activity.[6] However, this presumption is not raised in the instant case. While ATI was put on notice of Complainants involvement in legal proceedings with PPL by the Butler letters and Mr. Gutmann's notice of deposition, the evidence has not shown that these events in any way influenced ATI's decision to discharge Mr. Saporito. Dr. Diaz, who solely possessed authority to discharge within his department, was not employed by ATI when Mr. Gutmann received the Butler letters. The record does not offer any definite evidence, other than Mr. Saporito's own testimony, that Dr. Diaz had knowledge of the existence of those letters. Additionally, Dr. Diaz testified that he had decided in April, 1990 to terminate Complainant but did not wish to do so until the end of the school's quarter in May. Dr. Diaz credibly testified that he terminated Mr. Saporito because he was not a "team player", as evidenced by his poor attitude and letter to ATI and NATTS, and because he personally disliked Complainant. The undersigned finds no reason to doubt Dr. Diaz's veracity.

The letters of recommendation Dr. Diaz wrote for Complainant are consistent with his testimony. Dr. Diaz stated that he believed Complainant to be punctual and well-prepared for class. The letters of recommendation reiterated those statements; they did not offer any opinion on Mr. Saporito's

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performance of his job duties. Moreover, it is not unlikely or illogical that Dr. Diaz would offer to write Complainant such letters of recommendation. Although Dr. Diaz did not

wish to have Mr. Saporito in his employ, there exists no evidence suggesting that Dr. Diaz wanted to thwart Mr. Saporito's attempts to secure another position. Given the competitive nature of the current job market, the inability to produce a recommendation from a former employer could seriously harm Complainant's search for employment. If any inference can be read into the letters of recommendation, it can only be ATI's gesture of "good will" toward Mr. Saporito in his search for alternate employment.

Accordingly, ATI's termination of Complainant was not a violation proscribed by the ERA. In addition, Complainant has failed to establish that the Butler letters played any part in that discharge. The letters lacked any discriminatory intent or retaliatory motive; they were merely an employment verification letter and an apology. They do not constitute an instance of blacklisting. Therefore, Complainant has not proven his *prima facie* case under the Act regarding the Butler letters.

V. RELIEF

The evidence submitted in connection with this claim has not persuaded the undersigned that this office has appropriate jurisdiction to decide this matter. Assuming the undersigned possesses the requisite jurisdiction, this Court is still unable to fashion a remedy for Complainant as he has failed to establish a *prima facie* case against either ATI or FPL under 42 U.S.C. § 5851. ATI did not take any action against Complainant because of the Butler letters or because of any protected activity in which Complainant engaged. FPL's actions, specifically the Golden Comment and the Butler letters, were not adverse to Mr. Saporito within the meaning of the Act. Accordingly, Complainant's claim requires denial.

VI. ATTORNEY'S FEES, COSTS AND SANCTIONS

For sanctions to be imposed against an unsuccessful litigant, it must be shown that the individual pursued his claim in bad faith. Bad faith generally implies or involves

> actual or constructive fraud, or a design to mislead or deceive another... not prompted by an honest mistake as

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> to one's rights or duties, but by some interested or sinister motive. The term "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity... it contemplates a state of mind affirmatively operating with furtive design or ill will.

Black's Law Dictionary (5th Ed. 1983). As applied to legal causes of action, the concept represents a bar against frivolous claims. *See*, Fed.R.Civ.P. 11.

In the case at bar, Respondents have not established that Complainant's claim was either frivolous or brought in bad faith. To the contrary, it is apparent from the record that Complainant and his counsel believed a viable claim existed. A ruling adverse to their

position does not automatically warrant an award of attorney's fees, costs or sanctions. As the claim was grounded in good faith yet unsuccessful, each party should bear their expense of this litigation.

RECOMMENDED ORDER

Consistent with the foregoing, it is hereby ORDERED that Complainant's complaint is hereby DENIED.

E. EARL THOMAS
District Chief Judge

[ENDNOTES]

[1]The following abbreviations will be used when citing to the record in this matter: "RX" for Respondent's Exhibits; "CX" for Complainant's Exhibits and "TR" for Hearing Transcript.

[2]Complainant apparently questions the authenticity of this letter. In his post-hearing brief, he states "although it is not disputed ... that Steven E. Kennedy authored the rebuttal letter..., it is clear,... that the origin of the letter is in question ... The fact ... that the letter was distributed to the media by FPL on the same day it was authored raises the legitimate question of how, and why the letter was generated. An employee reading the article might well assume that if a safety concern was raised, FPL had within its power the tools to create real problems for the alleger regardless of the merits of the allegation, enough to get an employee to issue a rebuttal for use by FPL against the Complainant." Complainant has offered no objective evidence to support such a contention. Indeed, the Court has not found an iota of evidence in the record to cast doubt on the authenticity of authorship or the motivation behind such correspondence. Accordingly, the letter in question is found to be the work, and solely the work, of Mr. Steven E. Kennedy.

[3]*DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 11625 (9th Cir. 1984); *Ledford v. Baltimore Gas & Electric Co.*, 83 ERA 9, slip op. ALJ at 9 (Nov. 29, 1983), adopted by SOL.

[4]*Ashcraft v. University of Cincinnati*, 83 ERA 7, slip op. of SOL at 12-13 (Nov. 1, 1984); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1164 (9th Cir. 1984); *Consolidated Edison of N.Y., Inc. v. Donovan*, 673 F.2d 61, 62 (2nd Cir. 1982).

[5]*See, Lewis Grocer Co. v. Holloway*, 874 F.2d 1008 (5th Cir. 1989); *Simmons v. Simmons Industries Inc.*, No. 87 TSC 2 (July 14, 1988).

[6]*Priest v. Baldwin Assocs*., 84 ERA 30 (June 11, 1986).